

II. Rejections Under 35 U.S.C. § 103(a)

Rondeau et al. in view of Saphakkul

Claims 2-8, 32-50, 54-57, and 61-77 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Rondeau et al.* [US 6,001,135] in view of *Saphakkul* [EP 0,312,343] for reasons of record and for the reasons set forth at pages 2-3 of the final Office Action. Applicants respectfully traverse this rejection for reasons of record and for the following additional reasons.

In order to carry the burden of establishing a *prima facie* case of obviousness, the Examiner must show that there exists some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the references or to combine reference teachings in the manner proposed. See M.P.E.P. § 2143. For the reasons set forth below, the Examiner has failed to meet his burden of establishing a *prima facie* case of obviousness. Therefore the rejections under 35 U.S.C. § 103(a) are improper and should be withdrawn.

Rondeau et al. teaches a ready to use composition for the oxidation dyeing of hair comprising at least one oxidation base in combination with at least one oxidizing agent and at least one selected cationic direct dye. See col. 1, lines 25-31. As admitted by the Examiner, however, *Rondeau* neither teaches nor suggests the addition of quaternary ammonium salts to its dye compositions. The Examiner relies on *Saphakkul* to remedy this deficiency, but to no avail, as discussed below.

Saphakkul teaches a product for conditioning and gradually dyeing hair using a combination of basic and neutral direct dyes, a C8-C22 fatty alcohol, and a cationic surfactant, including quaternary ammonium salts. See page 2, lines 44-63. The compositions of *Saphakkul*, however, are not to be used with oxidative dyes such as those of *Rondeau*. See, e.g., page 2, lines 14-17. As *Saphakkul* discloses, oxidative dyes produce rapid color changes with a single treatment. *Id.* *Saphakkul* teaches away from the use of oxidative dyes for two reasons: first, according to *Saphakkul*, "the consumer usually prefers a gradual darkening treatment, so that the return to the original shade is not dramatic and therefore not noticeable to [a] casual observer." *Id.*; and second, when stronger dyes are employed, undesirable hand staining occurs. See page 2, line 29. To produce a gradual dyeing, *Saphakkul* utilizes a mixture of basic and neutral direct dyes with quaternary ammonium salts typically applied 10 times. See page 2, line 35 and page 6, line 1.

Thus, *Rondeau* teaches an oxidation dyeing composition containing oxidative dyes and direct dyes but does not teach or suggest the use of quaternary ammonium salts. *Saphakkul* teaches a direct dyeing composition containing direct dyes and quaternary ammonium salts but which specifically does not contain oxidative hair dyes. As argued of record and below, no motivation to combine these references exists.

In response to Applicants' argument of record that there is no motivation to combine the references, the Examiner's position appears to be that because

Saphakkul teaches dyeing products that achieve "rapid, uniform dyeing in a few minutes" (citing page 2, lines 27-30) and because *Rondeau* teaches hair dyeing compositions comprising direct dyes, there would have been a motivation to combine the quaternary ammonium salts of *Saphakkul* with the oxidative dyes of *Rondeau*. Office Action, pages 2-3.

The Examiner's logic is lost on Applicants. Certainly "rapid uniform dyeing" is a desirable property, but the Examiner has failed to read the passage he cited (page 2, lines 27-30) in context. In particular, *Saphakkul* teaches that use of oxidative dye can darken hair in a single treatment but that his invention is directed to gradual darkening. Page 2, lines 14-17. Accordingly, he shifts focus of the discussion to direct dyes. Page 2, lines 18-26. In the next passage, which is the one the Examiner cites, *Saphakkul* notes that if certain basic direct dyes are used, *i.e.*, instead of oxidative dyes, *moderate* darkening can occur in a few minutes, but the hand staining that accompanies it is unacceptable. Page 2, lines 27-30. **This passage does not refer to the invention of *Saphakkul* but to the prior art instead, and, in any event, does not support the Examiner's position.** The reference goes on to explain that if certain neutral direct dyes are used, the hand staining issue is resolved but the color uptake is probably too slow. Page 2, lines 31-34. Accordingly, the invention of *Saphakkul* is a combination of basic and neutral direct dyes, used with a cationic surfactant, to achieve a product that gradually

dyes/darkens hair "over a course of treatment. . . without the need to employ gloves." Page 2, lines 35-39.

In direct contrast to *Saphakkul*, whose compositions are applied as "course of treatment" where, e.g., the hair is typically dyed 10 times to achieve the desired shade (see page 6, line 1), *Rondeau* teaches a single application product, wherein the desired color is achieved after one use. See examples. As noted above, although *Rondeau*'s composition contains direct dyes, these dyes must be used in combination with an oxidation base and oxidizing agent. *Rondeau* explains that "to vary the shades obtained" with oxidation dyes and "to give them glints," direct dyes are added to oxidation dye compositions. Col. 1, lines 52-55. This can be a problem because the addition of direct dyes can lead to colorations with insufficient endurance. Col. 1, lines 63-67. Thus, the invention of *Rondeau* is an oxidation dyeing composition which "makes it possible to obtain colorations which are rich with glints and at the same time have good endurance properties." Col. 2, lines 1-5. In other words, both the oxidation base and the cationic direct dye of *Rondeau* are necessary ingredients.

One cannot, therefore, take the composition of *Rondeau*, remove the oxidation dye and the oxidizing agent, and combine the remaining ingredient, the direct dye, with the quaternary ammonium salts of *Saphakkul*. Nevertheless, this is what the Examiner appears to be doing: taking one ingredient out of each reference

and making a new composition, without any motivation to do so. This is picking and choosing at its extreme and is improper as the basis of an obviousness rejection.

In summary, the motivation to combine the cited references is entirely lacking here. The Examiner's rejection under § 103(a) is therefore improper and should be withdrawn.

Rondeau et al. in view of *Saphakkul* in further view of *Aaslyng et al.*

Claims 51-53 and 58-60 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Rondeau et al.* in view of *Saphakkul* in further view of *Aaslyng et al.* [WO 9719998] for reasons of record and for the reasons set forth at pages 3-4 of the final Office Action. Applicants respectfully traverse this rejection for reasons of record and for the following additional reasons.

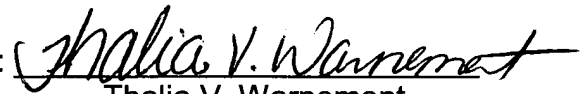
Rondeau and *Saphakkul* are discussed above. *Aaslyng et al.* is cited for its disclosure of couplers (pages 6-7) and of oxidation enzymes such as laccase (page 4, lines 30-34). *Aaslyng et al.* does not disclose anything which would have provided the missing motivation to combine *Rondeau* and *Saphakkul*. Therefore, for the reasons set forth above, the rejection under § 103(a) is improper and should be withdrawn.

CONCLUSION

In view of the foregoing remarks, Applicants respectfully request reconsideration and reexamination of this application and the timely allowance of the pending claims. Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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Date: May 17, 2002

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